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In the Supreme Court of the United States

OCTOBER TERM, 1979

AMERICAN TEXTILE MANUFACTURERS INSTITUTE, INC., ET AL., PETITIONERS

v.

RAY MARSHALL, SECRETARY OF LABOR

NATIONAL COTTON COUNCIL OF AMERICA, PETITIONER

v.

RAY MARSHALL, SECRETARY OF LABOR

COTTON WAREHOUSE ASSOCIATION, ET AL., PETITIONERS

v.

RAY MARSHALL, SECRETARY OF LABOR, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

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NATIONAL COTTON COUNCIL OF AMERICA, PETITIONER

v.

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No. 79-1789

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QUESTIONS PRESENTED

1. Whether the cotton-dust occupational health standard set by the Secretary of Labor is "feasible" within the meaning of 29 U.S.C. 655(b)(5) and "reasonably necessary or appropriate to provide safe or healthful employment and places of employment" within the meaning of 29 U.S.C. 652(8).

2. Whether the medical-transfer and income-protection provision of the cotton-dust standard is "reasonably necessary or appropriate to provide safe or healthful employment and places of employment" within the meaning of 29 U.S.C. 652(8).

3. Whether substantial evidence supports the Secretary's determination that employees exposed to cotton dust in cotton warehouses and cotton-classing offices may suffer material impairment of health.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 1

Discussion 4

Conclusion 10 11

TABLE OF AUTHORITIES

Cases:

American Iron & Steel Institute v. *OSHA*, cert. granted, No. 78-919 (July 2, 1980) 5, 11

Industrial Union Dep't, AFL-CIO v. *American Petroleum Institute*, No. 78-911 (July 2, 1980) 2, 4, 5, 11

Lawn v. *United States*, 355 U.S. 339 ..... 5, 9

Republic Steel Corp v. *OSHA*, cert. granted, No. 78-918 (July 2, 1980) 5, 10

Whirlpool Corp. v. *Marshall*, No. 78-1870 (Feb. 26, 1980) 8, 9

Statutes, regulation and rule:

Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.* 1

29 U.S.C. 652(8) 7

29 U.S.C. 653(b)(4) 9, 10

Page

Statutes, regulation and rule—Continued:

29 U.S.C. 655(a) 2

29 U.S.C. 655(b) 1

29 U.S.C. 655(b)(5) 4, 7, 8

29 U.S.C. 655(f) 1, 5

41 U.S.C. 35(e) 2

29 C.F.R. 1910.1043(f)(2)(v) 4, 6, 8, 9

Rule 13(d), Gen. R. D.C. Cir. 10

Miscellaneous:

41 Fed. Reg. (1976):

pp. 56498-56527 3

p. 56503 3

pp. 56503-56505 5

pp. 56503-56508 3

pp. 56504-56508 3

pp. 56505-56506 3

43 Fed. Reg. (1978):

pp. 27350-27380 4

pp. 27350-27399 ..... 1, 4

p. 27351 2

p. 27352 2

pp. 27352-27361, 27379 5

p. 27355 ..... 2, 3

p. 27358 5

Page

Miscellaneous—Continued:

43 Fed. Reg. (1978):

p. 27387 ..... 7, 8

pp. 28473-28474 1

pp. 35032-35035 1

pp. 56893-56894 1

45 Fed. Reg. 50328-50329 (1980) 10

S. Rep. No. 91-1282, 91st Cong., 2d Sess. (1970) (*reprinted in* Senate Comm. on Labor and Public Welfare, *Legislative History of the Occupational Safety and Health Act of 1970* (Comm. Print 1971)) 2, 8, 9

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 19-102)[1] is reported at 617 F. 2d 636. The Secretary of Labor's standard for occupational exposure to cotton dust and statement of reasons in support of the regulation appear at 43 Fed. Reg. 27350-27399 (1978), as amended at 43 Fed. Reg. 28473-28474 (1978), 43 Fed. Reg. 35032-35035 (1978) and 43 Fed. Reg. 56893-56894 (1978).

JURISDICTION

The judgment of the court of appeals was entered on October 24, 1979, and petitions for rehearing were denied on January 11, 1980 (Pet. App. 103). The petition for a writ of certiorari in No. 79-1429 was filed on March 14, 1980, and the petition in No. 79-1583 was filed on April 9, 1980. On April 2, 1980, the Chief Justice extended the time within which the Cotton Warehouse Association and the American Cotton Shippers Association could file a petition to May 10, 1980, and the petition (No. 79-1789) was filed on May 9, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C. 651 *et seq.*, authorizes the Secretary of Labor to establish, after notice and opportunity to comment, nation-wide, mandatory standards governing health and safety in the workplace. 29 U.S.C. 655(b). On June 19, 1978, the Secretary issued an OSHA standard limiting occupational exposure to cotton dust. 43 Fed. Reg. 27350-27399, 28473-28474, 35032-35035, 56893-56894 (1978). Pursuant to 29 U.S.C. 655(f), petitioners

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[1] "Pet. App." refers to the separately bound appendix to the petition in No. 79-1429.

challenged the standard on various grounds in the court of appeals. On October 24, 1979, the court upheld the standard in all but one respect (Pet. App. 19-102).

The background of the cotton-dust standard is explained in the opinion of the court of appeals (Pet. App. 29-38). Briefly, exposure to cotton dust induces a "constellation of respiratory effects" known as "byssinosis" or "brown lung disease" (43 Fed. Reg. 27352 (1978)) and was one of the expressly-recognized health evils that provoked passage of the Act. S. Rep. No. 91-1282, 91st Cong., 2d Sess. 3 (1970) (*reprinted in* Senate Comm. on Labor and Public Welfare, *Legislative History of the Occupational Safety and Health Act of 1970*, at 143 (Comm. Print 1971) ("*Leg. Hist.*")). See *Industrial Union Dep't, AFL-CIO* v. *American Petroleum Institute,* No. 78-911 (July 2, 1980), slip op. 35-36.

Exposure to cotton dust was not regulated in the United States until 1968. The American Conference of Governmental Industrial Hygienists recommended in 1966 that exposure be limited to 1000 ug/m^3 (1000 micrograms per cubic meter) of total dust averaged over an eight-hour day.[2] The Secretary of Labor adopted that limitation in 1968 as an occupational health requirement for public contractors under the Walsh-Healey Act. 43 Fed. Reg. 27351 (1978); see 41 U.S.C. 35(e). In 1971, the Secretary made this "established Federal standard" an occupational health standard for all covered employers pursuant to 29 U.S.C. 655(a).

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[2]This measure of dust concentrations includes both the respirable and nonrespirable fractions. The Secretary, in keeping with the current state of scientific opinion, keyed the new standard to exposure to the respirable fraction of the dust. 43 Fed. Reg. 27355 (1978).

In 1976, the Secretary proposed to reduce the 1000 ug/m^3 total dust standard to a 200 ug/m^3 respirable dust level in all operations. 41 Fed. Reg. 56498-56527 (1976); J.A. 170-200.[3] Numerous studies established that the prevalence of the disease was linearly related to the ambient air dust levels. For textiles, in particular, the exhaustive work of Dr. James Merchant developed a dose-response relationship for cotton-dust induced disease which showed that significant risk existed even at dust levels approaching zero. 43 Fed. Reg. 27355 (1978); J.A. 235-246, 256-263, 351-360, 361-369, 1492-1840. Nontextile industries were included within the scope of the proposed regulation based on the repeated observation of similar health effects on employees who handle the same material as textile workers. 41 Fed. Reg. 56503 (1976).

The Secretary proposed that reductions in dust levels be achieved through engineering controls such as ventilation. The Secretary maintained that individual respirators had proven too unreliable to provide effective long-term protection and that reliance on transfer of employees found to be at risk by a medical surveillance program was not practicable in view of the paucity of risk-free job assignments in the textile industry. 41 Fed. Reg. 56503-56508 (1976). The Secretary tentatively identified the lowest feasible level as 200 ug/m^3 in all operations and proposed to require that goal to be met by engineering controls in stages over a period of seven years. 41 Fed. Reg. 56505-56506 (1976). In the interim, the Secretary proposed reliance on respirators, a medical surveillance program, specified work practices to minimize exposure, and employee education and training. 41 Fed. Reg. 56504-56508 (1976). This proposal was followed by a series of

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[3] "J.A." refers to the joint appendix in the court of appeals.

public hearings and an extended period for the submission of written data, comments and other evidence, eventually producing a record exceeding 105,000 pages (Pet. App. 35).

The Secretary issued the final standard with his findings and explanation in June 1978. 43 Fed. Reg. 27350-27399 (1978). The standard requires textile employers to achieve a 200 ug/m^3 dust level to be met within four years, with the exception of slashing and weaving operations. For those processes, the Secretary raised the level to 750 ug/m^3, largely for technological and economic reasons. 43 Fed. Reg. 27350-27380 (1978). For nontextile industries, the Secretary set a dust level of 500 ug/m^3. The standard also requires employee exposure monitoring, medical surveillance, work practices, respirators, training and warning signs. In addition, the standard includes a medical-transfer and income-protection provision (29 C.F.R. 1910.1043(f)(2)(v)) requiring that, where certain levels of exposure are exceeded, an employee certified by a physician as unable to wear a respirator may transfer without loss of pay to any other position in the company that is available and that enjoys an exposure level below the designated level.

DISCUSSION

1. Petitioners in No. 79-1429 (Pet. 14-19) and petitioner National Cotton Council of America (Pet. 8-14) contend that the Court should grant review in this case in order to consider the meaning of the term "feasible," as used in 29 U.S.C. 655(b)(5), and to determine whether the Secretary, in issuing an OSHA standard, must establish that the costs of the standard bear a "reasonable relationship" to its benefits. These issues were presented but not decided by the Court in *Industrial Union Dep't, AFL-CIO* v. *American Petroleum Institute, Inc.*, No. 78-911 (July 2, 1980), slip op. 5, 29 (plurality opinion). These issues are

again presented, however, in *Republic Steel Corp.* v. *OSHA,* cert. granted, No. 78-918 (July 2, 1980), and *American Iron and Steel Institute* v. *OSHA,* cert. granted, No. 78-919 (July 2, 1980), which concern the OSHA standard for exposure to coke-oven emissions. See *Industrial Union Dep't, AFL-CIO* v. *American Petroleum Institute, supra,* slip op. 46 n.64 (plurality opinion) (significance test satisfied in findings made for coke-ovens standard). Accordingly, the petitions for a writ of certiorari in No. 79-1429 and No. 79-1583 should be held pending the disposition of those cases.[4]

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[4]We do not read the textile industry's petition as raising any challenge to the extent of the health risk from exposure to cotton dust. In any event, the Secretary made findings concerning the cotton-dust standard that satisfy the "significance" test announced in *American Petroleum Institute.* To begin with, even the plurality in *American Petroleum Institute* recognized (slip op. 35-36) that exposure to cotton dust was a "significant" health problem within the meaning of the test and was, in fact, one of the expressly-recognized occupational health evils that prompted passage of the Act. In addition, the Secretary found that the available evidence demonstrated that a significant number of cases of byssinosis could be avoided by implementation of the standard. See 41 Fed. Reg. 56503-56505 (1976) (findings on which initial proposal made) and 43 Fed. Reg. 27352-27361, 27379 (1978) (findings accompanying final standard). For example, in the preamble to the final standard, the Secretary found that certain studies make it "clear * * * that cotton dust produce[s] significant health effects at low levels of exposure." 43 Fed. Reg. 27358 (1978). These findings are amply supported by the epidemiological studies of Dr. Merchant and others. Accordingly, there is no need for further review of the "significant risk" issue in this case.

Moreover, this case is not appropriate for review of the meaning of the term "feasible," aside from the question of whether that term mandates a cost-benefit analysis. In the court of appeals, petitioners merely disputed the application of the "feasibility" test to this particular record. Accordingly, the court of appeals, having decided the cost-benefit issue adversely to petitioners, dealt with the feasibility issue on routine substantial evidence grounds (Pet. App. 67-69). Petitioners presented no attack on the Secretary's test for feasibility

2. Petitioners in No. 79-1429 contend (Pet. 20-25) that the court of appeals failed to apply the substantial evidence standard of review provided in 29 U.S.C. 655(f) and instead insisted only that the agency adequately articulate its reasoning and findings. This error, petitioners state (Pet. 22), stems from a so-called "Bazelon heterodoxy" that "has been developed in several concurring opinions of Judge Bazelon * * *." Because Judge Bazelon is the author of the court of appeals' opinion in this case, petitioners surmise that the court's result was influenced by the views expressed in those earlier concurring opinions.

There is no warrant in the record for petitioners' assertion that the court of appeals ignored its statutory obligations. To the contrary, the court's detailed discussion indicates that it was faithful to the substantial evidence test in this case. See Pet. App. 39-40, 43, 44, 61. The court observed that "[t]he substantial evidence test provides for more rigorous scrutiny than the usual 'arbitrary and capricious' test applicable to informal rulemaking" (*id.* at 39) and that "the reviewing court's task under the Act is to provide a careful check on the agency's determinations without substituting its judgment for that of the agency" (*id.* at 40). As an example of the court's "careful check," it scrutinized closely the accuracy of the Secretary's cost estimate for the cotton-dust standard (*id.* at 62-67). Indeed, the court held that the Secretary had not established the economic feasibility of

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other than that it failed to include a cost-benefit analysis. Nor did petitioners ever suggest that the Secretary's test would present a constitutional question regarding the delegation of legislative authority. Hence, petitioners have not preserved these objections for review. See *Lawn* v. *United States*, 355 U.S. 339, 362-363 n.16 (1958).

the standard as applied to cottonseed oil mills (*id.* at 86-93). In short, there is no merit to petitioner's assertion that the court did no more in this case than require the agency to articulate its reasoning.

3. Petitioners in No. 79-1429 claim (Pet. 25-29) that the Secretary exceeded his authority in including a medical-transfer and income-protection provision in the cotton-dust standard. 29 C.F.R. 1910.1043(f)(2)(v) provides that when a physician determines that an employee is unable to wear a respirator, the employee must be given an opportunity to transfer to another position having a dust level at or below the permissible exposure limit, if one is available, without loss of earnings or other employment rights (Pet. App. 8-9). The court of appeals correctly held (Pet. App. 95-98) that this provision is within the Secretary's authority under 29 U.S.C. 652(8) and 655(b)(5). No conflict in the circuits exists on this issue, and further review is therefore unwarranted.

The Secretary determined that it would take several years in some industries to phase in the required engineering controls to implement the cotton-dust standard and that during the interim employees should be equipped with respirators to avoid breathing air contaminated beyond the designated levels. However, the Secretary also determined that some employees are physically unable to wear respirators due to facial structure, severe discomfort, or impaired breathing capacity (43 Fed. Reg. 27387 (1978)). All parties to the rulemaking proceeding agreed that such employees should be transferred to another job station having little or no dust exposure (J.A. 1461, 2037, 2562, 2582-2583, 3351). However, experience under OSHA has shown that employees have a history of denying or minimizing work-related health problems for fear of being discharged or

transferred to lower paying jobs (J.A. 2121, 2123, 2126-2127, 2153-2154, 2579-2582). The Secretary found that "under such circumstances, in the absence of some opportunity to transfer to a position where a respirator need not be worn, [the employee] might very well be discharged, or otherwise sustain economic loss, due to his or her inability to wear a respirator." 43 Fed. Reg. 27387 (1978). Alternatively, the employee might be forced by economic circumstances to suffer continuing exposure to impermissibly high dust levels.

The Secretary is authorized by the Act to require "practices, means, methods, operations, or processes [that are] reasonably necessary or appropriate to provide safe or healthful employment" (29 U.S.C. 652(8)) and is given a mandate to ensure that "no employee will suffer material impairment of health or functional capacity" on the job (29 U.S.C. 655(b)(5)). The medical-transfer and income-protection provision is such a "practice," "means," or "method." The Secretary has determined, on the basis of substantial evidence, that exposure to cotton dust above certain levels is unsafe. Consequently, he has simply assured that employees unable to wear respirators will not have a disincentive to forego a transfer from a job in dangerously contaminated air, at least when they can perform other work "which is available or which later becomes available" (29 C.F.R. 1910.1043(f)(2)(v)) in safe areas of the plant.

To allow transfers without income protection would mean that the employee, not the employer, would bear the cost of ensuring occupational health and safety—contrary to Congress's express intent. See *Leg. Hist.* 144, 444, 854, 1150-1151; 43 Fed. Reg. 27387 (1978). 29 C.F.R. 1910.1043(f)(2)(v) clearly advances the purpose of the Act and is consistent with its legislative history. Hence, even though the statute does not expressly refer to medical

transfers, "when it is remembered that safety legislation is to be liberally construed to effectuate the congressional purpose," the provision is within the Secretary's broad statutory authority. *Whirlpool Corp.* v. *Marshall*, No. 78-1870 (Feb. 26, 1980), slip op. 11.[5]

Contrary to petitioners' contention (79-1429 Pet. 27-28), the challenged provision does not conflict with the Court's recent construction of the Act in *Whirlpool*. The congressional concern with the so-called "strike-with-pay" regulation discussed in *Whirlpool* centered on avoiding endless disputes over compensating employees for *not* working. See *Leg. Hist.* 416. As the Court observed in *Whirlpool* (slip op. 16), "[w]hen it rejected the 'strike with pay' concept * * * Congress very clearly meant to reject a law unconditionally imposing upon employers an obligation to continue to pay their employees their regular pay checks when they absented themselves from work for reasons of safety."

The provision at issue here stands in sharp contrast. Rather than enabling an employee to refuse to do any work and still be paid, the medical-transfer and income-protection provision only requires a transfer to do other work, and then only if such a position is available. Furthermore, the transfer provision may not be invoked by an employee unilaterally. Before a medical transfer may be obtained, a physician must determine that the employee cannot wear a respirator. The concerns of Congress as expressed in the legislative history of the Act and so discerned by this Court in *Whirlpool* are not at

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[5]Moreover, as the court of appeals remarked (Pet. App. 98), "[e]mployers will be burdened for only a short time by the medical transfer and wage guarantee provisions. Once employers achieve the requisite exposure levels, no employees, to be protected, will need respirators or job transfers."

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odds with this reasonable, limited means of protecting employees' health.[6]

4. Petitioners in No. 79-1789 contend (Pet. 9-11) that there is insufficient evidence to support the Secretary's determination that employees exposed to cotton dust in cotton warehouses and cotton-classing offices may suffer a material impairment of health. There is no need for the Court to consider this issue at this time.

In light of this Court's decision in *Industrial Union Dep't, AFL-CIO* v. *American Petroleum Institute, supra,* the Secretary has decided to re-examine and reconsider the cotton-dust standard as it applies to these two non-textile industries. See 45 Fed. Reg. 50328-50329 (July 29, 1980). At the same time, the Secretary has suspended the effectiveness of the standard for these industries pending

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[6]Petitioners also contend (79-1429 Pet. 28-29) that the medical-transfer and income-protection provision supersedes or otherwise affects workmen's compensation laws in contravention of Section 4(b)(4) of the Act, 29 U.S.C. 653(b)(4). This claim, which was not raised below (see *Lawn* v. *United States,* 355 U.S. 339, 362-363 n.16 (1958)), is without merit. Section 4(b)(4) is simply a general expression of congressional intent that the Act not be construed to preempt workmen's compensation or other employment-liability laws. The cotton-dust standard does not make the inability to wear a respirator compensable or affect the amount of any compensation award. Those officials who administer or apply compensation laws retain the authority to determine whether an employee is entitled to compensation and, if so, what amount the award should be. In addition, the employer's obligation under 29 C.F.R. 1910.1043(f)(2)(v) is only to assure that an employee "suffers no loss of earnings * * *." Accordingly, if an employee receives a compensation award because of a condition that also merits a transfer, any employer payment under this provision would be offset by the amount of the award and would not be in addition to the award. Hence, this provision, no more or less than any other provision of the standard, affects workmen's compensation laws only by preventing disease. But that is precisely the purpose of the Act. Section 4(b)(4) thus cannot be read in the bizarre fashion suggested by petitioners.

this re-examination. We therefore submit that the petition for a writ of certiorari in No. 79-1789 should be granted and that the portion of the case challenging application of the standard to cotton warehouses and cotton-classing offices be remanded to the court of appeals so that the record may be returned to the agency for further consideration. See Rule 13(d), Gen. R. D.C. Cir.

CONCLUSION

The petitions for a writ of certiorari in Nos. 79-1429 and 79-1583 should be held pending disposition of *Republic Steel Corporation* v. *OSHA*, No. 78-918, and *American Iron and Steel Institute* v. *OSHA*, No. 78-919. The petition for a writ of certiorari in No. 79-1789 should be granted and the case remanded, insofar as it concerns application of the cotton-dust standard to cotton warehouses and cotton-classing offices, in order to allow the Secretary to reconsider that portion of the standard in light of *Industrial Union Dep't, AFL-CIO* v. *American Petroleum Institute,* No. 78-911 (July 2, 1980).

Respectfully submitted.

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1453